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No. 713

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HAROLD B. WILLEY

UNITED STATES OF AMERICA

IN THE

Supreme Court of the United States

_____Term, 1953

IN THE MATTER OF MACOMB TRAILER COACH, INC., a Bankrupt

E. B. McINNIS, TRUSTEE,

Petitioner,

v.

MELVIN WEEKS AND BERTHA WEEKS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KENNEY, RADOM & ROCKWELL

Attys. for Edith B. McInnis, Trustee in Bankruptcy of Macomb Trailer Coach, Inc., a Michigan corporation

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MELVIN WEEKS AND BERTHA WEEKS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

E. B. McInnis, Trustee, prays that a Writ of Certiorari be issued to review the Judgment of the Court of Appeals for the Sixth Circuit entered in the above cause on December 17, 1952, and amended on January 23, 1953, subsequent to the filing of a Petition for Rehearing by petitioner herein.

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OPINIONS BELOW

The Opinion of the District Court is not officially reported, the same being printed on pages 27 and 28 of the Record accompanying this petition. The original Opinion of the Court of Appeals is reported in 200 F. 2d 611, and a certified transcript thereof is attached to the Record. The amendment of January 23, 1953, to the Court of Appeals' Opinion is not yet officially reported, and is also attached to the Record.

JURISDICTION

The jurisdiction of this Court is invoked under Act of July 7, 1952, c. 579, §9, 66 Stat. 424, 11 U.S.C. §47(c).

QUESTION PRESENTED

1. Whether it is mandatory for a court of bankruptcy to award post-bankruptcy interest to a secured creditor to the date of payment, where the proceeds of the security, liquidated in the bankruptcy proceedings, are ample for that purpose, but where no equities in favor of the secured creditor are established.

STATUTES INVOLVED

In petitioner's view, doctrines enunciated by this Court, apart from the direct application of specific provisions of the Bankruptcy Act, are controlling of the issues in this case; however, the following sections of that Act are involved:

"§2a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act * * *."

§57h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court."

§63a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest."

STATEMENT

The dispute in the instant case arises out of an Order of the Referee in Bankruptcy, entered January 12, 1951, allowing post-bankruptcy interest to a secured creditor to the date of confirmation of an abortive first sale of the property in the bankruptcy proceedings, but denying interest subsequent to that date, although the proceeds of

the security from a later sale were ample to pay interest in full, the first sale having been cancelled upon petition of the purchaser due to delays which the Referee found to be chargeable to the conduct of the secured creditors. The Findings and Order of the Referee were affirmed by the District Court upon Petition for Review filed by the creditor. The Court of Appeals reversed, and the Trustee petitions this Court for a Writ of Certiorari to review the Judgment of the Court of Appeals.

The material facts in this case are as follows:

An Involuntary Petition in Bankruptcy was filed on October 28, 1948, against Macomb Trailer Coach, Inc., a Michigan corporation, which was successor to Macomb Trailer Coach Company, a co-partnership (R. 1, 15). An Order of Adjudication was entered on December 17, 1948, after an Answer and Demand for Jury Trial, filed by the alleged bankrupt, were withdrawn (R. 16).

Among the bankrupt's assets coming into the possession of the Trustee and over which the Bankruptcy Court assumed jurisdiction was a certain parcel of real estate which had originally been sold on land contract, dated May 28, 1947, by Melvin Weeks and Bertha Weeks, his wife, to the bankrupt's predecessor, at a price of $20,000.00 (R. 1; Exh. 1, R. 4). The bankrupt corporation, which was formed in October of 1947 (R. 1), acquired the property by assignment from the partnership and on February 2, 1948, a new land contract was entered into between it and the Weeks, superseding the previous contract, and stipulating a purchase price of $25,000.00, with interest at 4% (R. 2; Exh. 2, R. 6-8). The difference between the balance due on the original land contract and the new purchase price of $25,000.00 represented advances of money and property by the

Weeks to the predecessor partnership subsequent to the execution of the original land contract (R. 2).

The Trustee questioned the right of the vendors to include the sums represented by these advances within the lien of the land contract, claiming that a separate security transaction was involved, which should have, but had not, been recorded as a mortgage (R. 2, 3). In view of this contest as to the scope of the vendors' lien, and to facilitate liquidation of the security, the Trustee petitioned for and the Referee on March 17, 1948, granted leave to sell the property at public auction free and clear of liens, and on March 25, 1949, such a sale to one Spector, at a price of $27,500.00, was confirmed by the Referee, the Order providing that all liens were transferred to the proceeds of the sale (R. 16, 17). The vendors, however, refused to execute a deed of conveyance unless the entire principal balance claimed to be due on the land contract, including interest, were paid in full concurrently with their conveyance (R. 9, 10, 17, 31). Negotiations between the Trustee and the vendors ensued, in an effort to arrive at a solution of the controversy which would permit the sale to be consummated, but without success (R. 17). Whereupon Spector petitioned to be released from the sale, which petition was granted by the Referee on September 9, 1949 (R. 10, 17). Shortly thereafter, the vendors filed a petition asking the Court to determine that the Trustee had no interest in the property and for leave to foreclose the land contract, and challenging the jurisdiction of the Referee to determine questions relative to the validity of their lien (R. 3, 17). In connection with this petition the vendors argued that the Trustee had not assumed the land contract, and that they (the vendors) were entitled to a return of the property or to the entire proceeds of any sale

thereof (R. 3, 18, 19). Hearing on this petition was adjourned from time to time to permit filing of briefs and a stipulation of facts (R. 1-3, 17).

In December, 1950, while the vendors' said petition and the Trustee's objections to the validity of the vendors' lien were still pending, the Trustee received an offer of $41,000.00 for the property which was approved by the Referee (R. 18). At about the same time, in an Opinion and Order dated December 27, 1950, and January 12, 1951, respectively, the Referee denied the vendors' petition, and also rejected the Trustee's objections to the vendors' lien (R. 9-13). With respect to the latter action, however, the Referee stated that "it was a close legal question", and that "many of the equities were with the unsecured creditors and the Trustee" (R. 10). The Order fixed the amount due the vendors at $20,646.28, with interest at the contract rate from January 1, 1949[1], to March 25, 1949[2], the date of the confirmation of the original sale to Spector (R. 11). No interest was allowed subsequent to the latter date, the Referee ruling that "any and all delay that has resulted since March 25, 1949, is clearly chargeable to the conduct of the vendors" (R. 10-12).

The Order further required the vendors to convey title to the purchaser and provided that such conveyance would

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1—Interest on the land contract had been paid to January 1, 1949, by virtue of three payments of $500.00 each, which were made on the land contract by the bankrupt or Receiver on November 8 and December 6, 1948, and January 6, 1949 (R. 19-20; Exh. 2, R. 8), this sum of $1500.00 having been derived from rentals received for the property during that period.

2—Interest was allowed by the Referee from January 1 to March 25, 1949, on the ground that the proceeding was an involuntary one, "and the vendor cannot equitably be charged for the delay" (R. 10).

be without prejudice to their claimed right to withhold conveyance unless they received principal and interest in full to date of payment (R. 12).

The principal and interest thus found to be due by the Referee was paid to the vendors, and a conveyance executed by them to the new purchaser[3].

A Petition for Review of this Order was filed by the vendors on January 22, 1951, alleging that the Referee erred in denying interest on the land contract "from March 25, 1949, to date of payment of the amount due on said contract" (R. 13-14). In their petition, the vendors repeated their previous contentions that the Trustee had no interest in the property and that they should be allowed to foreclose; however, these grounds of review were subsequently abandoned by them (R. 13, 14, 26).

In his Certificate, filed June 22, 1951, on this Petition for Review, the Referee repeated his finding that "all delays from that time (March 25, 1949) on were caused by the conduct of the vendors in refusing to convey title to the property in question" (R. 21).

In the Stipulation Re Testimony, filed in the Circuit Court of Appeals proceedings, it was expressly agreed, among other things, that this finding of fact would be accepted as true, as well as all other findings of fact set forth in the Referee's Certificate. In view of this stipulation, the Trustee did not insist upon inclusion, in the Record to the Court of Appeals, of additional pleadings and proceedings before the Referee which supported his Findings.

3—Although not clearly indicated by the Record, the fact that the vendors were tendered and accepted the amount of principal and interest specified in the Referee's Order and executed a deed was conceded in the Brief filed by vendors in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

1. The decisions of the Courts of Appeals subsequent to this Court's ruling in *Vanston Committee* v. *Green*, 329 U. S. 156, are in conflict, and are in disagreement as to the effect of the ruling in the *Vanston* case, on the question here at issue. The Ninth Circuit, (*Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10, cert. den., 343 U. S. 953)[4], adopting the view contended for by petitioner herein, held that the *Vanston* case precluded allowance of post-bankruptcy interest to the secured creditor out of the proceeds of his security since he had established no equities favoring the allowance of such interest. On the other hand, the Fifth Circuit (*Oppenheimer* v. *Oldham*, 178 F. 2d 386), relying upon *obiter dicta* in the *Vanston* case[5], has announced an exactly opposite conclusion, allowing such post-bankruptcy interest without any consideration of the equities involved. The Sixth Circuit, as indicated by its decision in the instant case, does not regard the *Vanston* case as controlling in either direction, but rather *distinguishes* that case, stating that it "did not involve the same question which is presented here", but rather "involved interest on interest". Finally, the First Circuit has held payment of such interest to be "warranted" without mentioning the *Vanston* case (*Kagan* v. *Industrial Washing Machine Corp.*, 182 F. 2d 139). This Court should grant its discretionary writ to resolve this conflict in the Circuits and to clarify its holding in the *Vanston* case.

4—In a footnote to its opinion, page 14, the Court of Appeals declared that its earlier contrary decision in *U. S.* v. *Sampsell*, 153 F. 2d 876, "was necessarily overruled by the Supreme Court in the *Vanston* case".

5—On page 164, this Court stated: "Simple interest on secured claims accruing after the petition was filed was denied unless the security was worth more than the sum of principal and interest due", citing *Sexton* v. *Dreyfus*, which does not so hold.

II.

1. In petitioner's view, the Court below, and the Circuits which are in accord with its holdings, have failed properly to interpret and apply the decisions of this Court in *Sexton* v. *Dreyfus,* 219 U. S. 339; *Vanston Committee* v. *Green,* supra, and *New York* v. *Saper,* 336 U. S. 328, and have not recognized the implications of this Court's decision in *U. S. Bank* v. *Chase Bank,* 331 U. S. 28.

2. In the *Vanston* and *Saper* cases, supra, this Court, in denying post-bankruptcy interest on mortgage bond coupons and on federal and state tax claims, significantly reaffirmed the principle first enunciated by Justice Holmes more than forty years earlier in *Sexton* v. *Dreyfus,* supra, that interest on both secured and unsecured claims stops at bankruptcy, a rule derived not from "legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied". *New York* v. *Saper,* supra, at p. 330. In the *Saper* case, this Court emphasized that the bankruptcy statute contains no provision expressly repudiating that principle, but that on the contrary, "the long standing rule against post-bankruptcy interest thus appears implicit in our current Bankruptcy Act" (Page 332)[6]. The rule is subject only to the power of the bankruptcy court, sitting as a court of equity, to invoke equitable principles in the allowance or disallowance of claims. *Pepper* v. *Litton,* 308 U. S. 295; *Vanston Committee* v. *Green,* supra, at pp. 162, 163. As the Court stated in the latter case, at p. 165:

6—The ruling of the *Saper* case, a "straight" bankruptcy case, has been extended to Ch. X proceedings, *U. S.* v. *Edens,* 189 F. 2d. 876 (C. A. 4), and to Ch. XI proceedings, *U. S.* v. *Gen. Engineering & Mfg. Co.,* 188 F 2d 80 (C.A. 8), both of which decisions ere affirmed by this Court per curiam on January 14, 1952.

> "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization, has been a balance of equities between creditor and creditor or between creditors and the debtor."

Applying equitable principles, two exceptions to the rule of *Sexton* v. *Dreyfus* have been recognized in the English and American cases, namely (1) where the alleged bankrupt's estate proves to be solvent, interest has been paid to both secured and unsecured creditors in preference to returning the money to the debtor[7], and (2) where the securities yield income after bankruptcy, that amount has been applied to the secured creditor's claim for post-bankruptcy interest[8]. However, to quote the opinion in the *Beecher* case, page 14:

> "Except as stated above, the only time in which the majority of modern cases have allowed interest after bankruptcy on secured claims is *when the courts have discovered equitable reasons for doing so. Vanston Committee* v. *Green* * * *; *Pacific States Corp.* v. *Hall*, 9th Cir., 166 F. 2d 668." (Italics supplied.)

7—*N. Y.* v *Saper*, supra, footnote 7, at p. 330; *In re Deep Rock Oil Corp.*, 113 F. 2d 266 (C.A. 10); *Littleton* v. *Kincaid*, 179 F. 2d 848 (C.A. 4), cert. den. 340 U. S. 809; *Beecher* v. *Leavenworth State Bank*, supra, at p. 14.

8—*N. Y.* v. *Saper*, supra, footnote 7, at p. 330; *Wilson* v. *Dewey*, 133 F. 2d 962 (C.A. 8); *Beecher* v. *Leavenworth State Bank*, supra, at p. 14. This exception was also mentioned in *Sexton* v. *Dreyfus*, p. 346. However, Justice Holmes' opinion indicates that he had in mind a situation in which the bankrupt, not unsecured creditors, stood to profit if the income was not applied to the secured creditors' claim for post-bankruptcy interest, a situation analogous to that of solvency of the debtor's estate. Thus, *Sexton* v. *Dreyfus is not* authority for allowance of post-bankruptcy interest out of income where the funds available to general creditors is thereby reduced.

In its ruling, the Court below has *not* rested its decision upon a consideration of the equities involved, but rather has promulgated a *mandatory* rule, requiring allowance of post-bankruptcy interest irrespective of the equities, contrary to the doctrine of the *Vanston, Saper,* and *Dreyfus* cases.

3. *Coder* v. *Arts,* 213 U. S. 223, cited by the Court below in support of its conclusion, is of doubtful applicability, or if applicable, is of questionable validity, in view of the recent decisions of this Court. In *Coder* v. *Arts,* a one-sentence conclusion of the Court affirmed, without elucidation, the allowance of post-bankruptcy interest, "inasmuch as the *estate* was ample for that purpose"[9]. That the use of the word "estate" rather than "security" in the language just quoted is significant, is evident from the opinion of this Court in the *Vanston* case, pp. 164, 165, where *Coder* v. *Arts* is cited as authority only for the proposition that equitable considerations permit payment of post-bankruptcy interest to the secured creditor in preference to the debtor, in the event the estate proves to be solvent. The ruling in *Coder* v. *Arts* is further minimized in the *Saper* case, at p. 337, where, in distinguishing the *Coder* case, this Court refers to it as stating (not holding) "as a *subsidiary point only* that, where the *estate* was adequate,

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9—The precise ruling in the case limited payment of interest to the date collection of the proceeds from the sale of the mortgaged security was completed. See 152 F. 943, at page 950. It is also important to note that the Trustee-Appellant in the *Coder* case did not argue this point in either his original or reply brief in the Supreme Court. See Records and Briefs, *Coder* v. *Arts,* Case No. 93, October 1907 Term. Furthermore, *Coder* v. *Arts* was decided a number of months before *Sexton* v. *Dreyfus,* the latter case being the first in which this Court, in the opinion rendered by Justice Holmes, gave the problem thorough consideration.

interest *could properly* [not "must"] be allowed on a mortgage". Furthermore, the rationale of the Court of Appeals in the *Coder* case, namely, that recognition of the validity of the secured creditor's lien requires payment of interest as well as principal after bankruptcy, is rejected in the *Vanston* case; for, although assuming the validity of the contractual provision in the security for payment of interest on interest, the Court there ruled that payment of such interest was subject to the equitable powers of the bankruptcy court.

4. The Court's decision in *United States Bank v. Chase Bank*, 331 U. S. 28, appears to relegate secured creditors to the same status as unsecured creditors insofar as payment of post-bankruptcy interest is concerned, where, as in the instant case, the security is liquidated by the bankruptcy court. In enumerating the "avenues of action" open to the secured creditor, the Court, at pages 33 and 34, states that "he *must file a secured claim* * * * if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, inasmuch as that court has exclusive jurisdiction over the liquidation of the security". The necessity for filing a secured claim brings into play the provisions of Section 63a of the Bankruptcy Act limiting payment of interest to the date of the filing of the bankruptcy petition.

III.

1. The decision of the Court below raises a question of great public importance in connection with the administration of the Bankruptcy Act. Denial of the power to apply equitable considerations to the granting or denial of post-bankruptcy interest on secured claims out of the

proceeds of the security will seriously affect the orderly liquidation and equitable distribution of the bankrupt's assets which is a primary concern of the bankruptcy court[10].

2. The trustee, junior lien-holders and unsecured creditors should be free to make reasonable challenges to the validity of an asserted senior lien, without incurring the penalty of diminution of the surplus available to them out of the security by accrual of interest during the contest. It is no answer to make the allowance or disallowance of post-bankruptcy interest depend, as the Court below has done, upon the outcome of the contest[11]. At the time the decision whether to challenge the lien must be made, the outcome is not known. If a penalty is to be imposed for failure, knowledge of the possible penalty will deter desirable freedom of action. If the action of the trustee, or other party challenging the lien, is reasonable and warranted, no penalty should attach to ultimate lack of success. In this connection, the finding of the Referee, in upholding the validity of the vendors' lien, that "it was a close legal question" and that "many of the equities were with the unsecured creditors and the trustee", is material (R. 10).

10—A complete analysis of the problem is presented in a recent article by Referee Archie Katcher, of the Bankruptcy Court for the Eastern District of Michigan, entitled "A Re-examination of the Allowability of Interest on Secured Claims", Vol. 25, No. 2, Journal of the National Association of Referees in Bankruptcy p. 40, April, 1951). The reasons stated under this heading for allowance of the writ are also ably set forth in the opinion in *Beecher* v. *Leavenworth State Bank*, supra, at page 14.

11—The Court of Appeals ignored in its decision the fact that the Trustee was successful in certain phases of the controversy (R. 12, 20, 22, 23, 26-28).

3. Apart from litigation, delays are occasioned in the normal and routine liquidation and distribution of the bankrupt's estate. The estate should not be penalized because of the delays which the law requires, nor should the secured creditor be permitted to benefit thereby, in the absence of a showing of substantial equities in his favor. To quote this Court's opinion in *Vanston Committee* v. *Green*, supra, page 163:

> "'As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claim against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate'. * * * Courts have felt that it would be inequitable for anyone to gain an advantage or suffer a loss because of such delay."

Frequently, the institution of bankruptcy proceedings is preceded by distress financing in which the debtor mortgages his property at excessive rates of interest, and with provisions requiring payment of interest for the full term of the security agreement. The decision below would require the bankruptcy court to accord full recognition to the interest provisions of such transactions without regard to injustices resulting to unsecured creditors who may have taken no such advantage of the necessities of the debtor.

4. Allowance of post-bankruptcy interest has the further adverse effect of inducing quick sales of the security in order to conserve the estate's equity. Such sales may not be consummated upon the same advantageous terms which more deliberate evaluation of prevailing economic factors would produce, again to the detriment of the general estate.

IV.

There are no equities in the instant case justifying the allowance of post-bankruptcy interest to the vendors; on the contrary, the facts amply support the Referee's denial of such interest. The Court of Appeals concluded that the delay was "the result of legal proceedings which the vendors had a right to invoke"; however, we submit that the vendors' resort to litigation is not an equity in their favor. On the other hand, the bad faith of the vendors was indicated by their abandonment of contentions which they had pressed beforethe Referee,—including their challenge to his jurisdiction to consider the matter at all, and their claim to be entitled to the entire proceeds from the sale of the property, even though the amount realized was far in excess of the balance due them. Moreover, the fact still remains that the vendors' persistent refusal to execute a conveyance and permit the original sale to be consummated,—in total disregard of the rights of unsecured creditors and despite the complete protection afforded them by the Referee's order transferring their lien to the proceeds,—resulted in the cancellation of the sale, as a consequence of which considerable delay ensued. The fact that a higher price was ultimately realized was entirely fortuitous; the situation could well have been the reverse. We submit that the "balance of equities between creditor and creditor", under the circumstances of this case, clearly supports the rulings of the Referee and District Court and requires reversal of the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

KENNEY, RADOM & ROCKWELL,

By: JOSEPH S. RADOM,

Attys. for Edith B. McInnis,

Trustee in Bankruptcy of
Macomb Trailer Coach, Inc.,
a Michigan Corporation.

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vs.

MELVIN WEEKS and BERTHA WEEKS,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES INVOLVED

None

United States of America

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Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

The question involved in this case is whether a secured creditor (a land contract vendor) is entitled to interest to date of payment of the balance due where the vendee is adjudicated bankrupt and the property is sold by the bankruptcy court for more than the unpaid balance of the purchase price.

STATEMENT

A land contract is an agreement by which the owner of real property agrees to sell it to a purchaser, retaining title until payment of the purchase price, upon payment of which the purchaser is entitled to a deed, conveying the property to the purchaser.

See: *Barker v. Klingler,* 302 Mich. 282, 288;
Palmer v. Fox, 274 Mich. 252.

The material facts in this case are that Mr. and Mrs. Weeks (hereinafter called Weeks) owned some real estate in Michigan. They sold it on land contract to Mr. Theusch and Mr. Ward—a partnership (R. p. 4) on May 28, 1947 for $20,000.00 (Ex. 1, R. p. 4; Stipulation of facts R. p. 1, paragraph 3). Weeks later advanced cash and property to the partnership (R. 2, paragraph 6 of the Stipulation of facts). This advancement of cash and property to the partnership was repaid to Weeks by the execution of a new land contract (which cancelled the original contract) to the Macomb Trailer Coach, a corporation (Exhibit 2) for $25,000.00, dated February 2, 1948, the difference between the balance due on Exhibit 1 and the $25,000.00 purchase price in Exhibit 2, being the amount of cash and property advanced by Weeks to the partnership. (Stipulation of facts R. 2, paragraph 6; Exhibit 2, R. p. 6). In this way the debt of the individual partners to Weeks was paid, and the partners were relieved of all personal liability for the purchase price of the property.

On a petition filed in October, 1948, more than six months after this latter transaction, the corporate purchaser was adjudicated bankrupt.

The trustee claimed the right, in effect, to annul the repayment of the moneys advanced by Weeks to the partnership, annul the $25,000.00 land contract, Exhibit 2, and have the situation re-instated where (as they claim) Exhibit 1 was in effect as a valid contract for a sales price of $20,000.00 to the partnership (assigned to the bankrupt) and Weeks had a claim against the individual partners for the moneys and property advanced to the partnership. (Stipulation of facts, R. 2, paragraph 11). This claim was denied by the referee in Bankruptcy, who (R. 10, line 18) "reached the conclusion that the contract entered into between the bankrupt corporation and the vendors on February 8, 1948 was the final and binding contract between the parties and the purchase price stated therein was the final and binding purchase price." No appeal was taken from this determination and hence we do not discuss the trustee's claim; we refer to it only so that the Court will have the background of the proceedings.

Proceedings for the sale of the property were instituted by the trustee and the property sold by the trustee for $27,500.00 in March, 1949. The referee in bankruptcy on March 25, 1949 ordered Weeks to give a deed which Weeks refused to do except upon payment of the moneys due to them. Weeks took an appeal from this order of March 25, 1949 which appeal was never heard because no certificate for review was filed while the parties attempted to agree (R. 17) on some solution of the problem. Finally the $27,500.00 sale was cancelled because the purchaser insisted on a deed from Weeks, who would not give a deed unless they were paid the moneys due to them, and the trustee (insisting upon a determination of his claim, *supra*) would not pay Weeks the moneys Weeks claimed ($20,646.28) to be due which claim was later adjudged to be correct to the penny (R. 12).

Various petitions were filed by the parties which resulted in a determination (opinion R. 9; order R. 11) of the amount due (the amount claimed by Weeks) ordering payment thereof, but cutting off interest as of March 25, 1949 and ordering execution of a deed without prejudice to Weeks' right to claim interest.

The property was sold on December 26, 1950 for $41,000.00 (at which time an oral opinion as to the amount due was given—the formal written opinion being filed December 27, 1950). Weeks then gave a deed and accepted the principal and interest to March 25, 1949 without prejudice to his right to interest as set forth in the order (R. 12) and the sale for $41,000.00 was consummated.

It was agreed "that Melvin Weeks and Bertha Weeks were always willing to convey the property in accordance with the terms of said land contract, but always insisted that full payment, including interest, and conveyance were to be concurrent acts" (R. 31, line 4).

"They (Weeks) were at all times willing to convey upon payment to them of the unpaid principal with interest to date of payment, according to the terms of their contract." (Opinion of Court of Appeal, R. 39.)

The District Judge, on appeal from the referee in bankruptcy in a terse statement (R. 27) affirmed the referee. The Court of Appeals reversed the District Judge and its opinion (R. 36 and 55) ordered that interest be paid until date of payment.

The trustee's petition for writ of certiorari is based upon the claim that:

I.

There is a conflict between the various courts of appeal (Petition for writ of certiorari, page 8).

II.

The various courts of appeal agreeing with the court of appeals for the 6th Circuit, "have failed properly to interpret and apply the decisions of this Court" (Petition for writ, page 9).

III.

All interest stops at bankruptcy, except that the bankruptcy court, sitting as a court of equity, may determine when it thinks equitable or inequitable to allow or disallow interest. (Petition for writ page 1.)

IV.

Denial of the power to allow or disallow interest will affect the orderly administration of a bankrupt estate. (Petition for writ pages 12-13.)

V.

Under the facts in this case it is inequitable to allow interest. (Petition for writ, page 15.)

We believe the above covers all the claims for allowance of the writ although the various claims overlap and are not clear-cut.

ARGUMENT

Petitioners claim that there is a conflict between the various courts of appeal.

This is not the fact. The decision below agrees with the various courts of appeal which have considered the question:

1st Circuit—*Kagan v. Industrial Washing Machine Co.*, 182 Fed. (2) 139.

2nd Circuit—*In re Gotham Co.*, 48 Fed. (2) 540.

4th Circuit—*Littleton v. Kincaid*, 179 Fed. (2) 848.

5th Circuit—*Oppenheimer v. Oldham*, 178 Fed. (2) 386; *United States v. Paddock*, 187 Fed. (2) 271; *San Antonio Land and Trust v. Booth*, 2 Fed. (2) 590.

6th Circuit—The decision below.

7th Circuit—*In re Chicago, R. I. & P. Ry. Co.*, 155 Fed. (2) 889.

8th Circuit—*Wilson v. Dewey*, 133 Fed. (2) 962.

10th Circuit—*In re Deep Rock Oil Corp.*, 113 Fed. (2) 266.
(Opinion below, R. 38.)

In addition we might cite:

9th Circuit—*United States v. Sampsell*, 153 Fed. (2) 731.
(which petitioner claims is overruled by *Beecher v. Leavenworth*, 192 Fed. (2) 10.)

Every Circuit except the third Circuit, which has not had the opportunity, has considered and decided the question as did the court below; the ninth circuit has also similarly decided the question in the Sampsell case unless the Beecher case overruled it.

Did Beecher overrule Sampsell on this point? It did not; it overruled Sampsell on the question of *compound* interest, interest on interest, as required by *Vanston Bondholders v. Green*, 329 U. S. 156.

In *United States v. Sampsell, supra,* the court recognized the general rule that "interest stops running on

secured and unsecured claims after a debtor passes into bankruptcy unless the estate is solvent." "There is an exception, however, holding that the rule does not apply to debts or claims of secured debts after and during bankruptcy when the mortgaged property is sufficient to pay the principal and interest of the mortgaged debt" (page 736).

The above is the exception recognized by the Court below and the other courts of appeal.

But in Sampsell the court allowed interest on interest. No question was raised as to compound interest insofar as the opinion shows.

Analysis of the claim in Sampsell as described in the opinion (page 733) shows the following should have been the amount of the claim:

5% note dated 1/19/41 for.....	8444.08
Interest from 1/19/41 to 5/10/43, (date of referee's opinion).....	970.22
	9414.30

The court allowed the claim at $10,484.78 plus attorney fees.

> "The balance due upon said note and mortgage, *principal and interest* exclusive of attorney's fees, is the sum of $10,484.78, *plus interest* thereafter at the rate of 5% per annum until paid." Sampsell, page 733. (Emphasis supplied.)

The only conclusion the writers of this brief can draw is that the difference between $10,484.78 the claim as evidently allowed and $9,412.30, what the claim should have been (principal and interest) is the compound interest, and that interest on interest was allowed.

Beecher did not involve a case where the security was worth more than the debt. A note in 192 Fed. (2) 10, bottom of page 11, refers to the "involved litigation of which this appeal is a part." One of the prior appeals (*Beecher v. Federal Land Bank,* 146 Fed. (2) 934) shows that the assets of the bankrupt were:

Orchard	9,000.00
800 acres	750.00
Total value	9,750.00

The mortgages and liens were, as shown in 192 Fed. (2) 10, page 12:

1. Mortgage on nearly all of orchard to Federal Land Bank (Sheriffs sale April 29, 1939, total over	$ 7,500.00
2. Lien by decree of State Court to Leavenworth Bank—dated January 6, 1940 on all of orchard-total over	22,000.00
3. County of Chelan taxes	
4. Katherine Parker, over	1,900.00
Total	$31,400.00

The mortgaged property was worth *less* than the liens against it. Beecher did not involve a case where the security was worth *more* than the liens against it.

In Beecher another of the three exceptions to the general rule stopping interest at bankruptcy was involved, viz:

> Where the security though worth less than the mortgage debt produces income, interest on the secured claim (not exceeding the income) is allowed after date of bankruptcy.

This exception to the rule was recognized in *Sexton v. Dreyfus,* 219 United States 339.

The Beecher footnote, page 14, said that Sampsell was necessarily overruled by Vanston. *Vanston Bondholders Committee v. Green,* 329 U. S. 156, did not involve simple interest; it involved interest on interest. The assets in Vanston:

> "are sufficient to pay first mortgage bondholders in full, including the interest on interest. Should interest on interest be paid, however, subordinate creditors would receive a greatly reduced share in the re-organized corporation. These latter concede that the first mortgage bondholders should receive simple interest on the principal due them, but challenge their right to be paid interest on interest * * *. It is this controversy which we must determine." (Page 159)

Vanston decided that interest on interest was not permitted.

If Sampsell allowed post bankruptcy interest, but evidently allowed interest on interest and Vanston did not involve simple interest, but forbade compound interest, it is fairly obvious that Vanston overruled Sampsell only on the question of compound interest.

This conclusion is fortified by the fact that this Court, in Vanston, bottom of page 164, referred to *Collier on Bankruptcy,* 14th Edition, Vol. 3, pages 281 and 1835, which states the exception allowing post bankruptcy interest and the fact that this Court cited the opinion in *Ticonic Bank v. Sprague,* hereinafer cited.

In Vanston, this Court said,

> "Simple interest on secured claims accruing after the petition was filed was denied unless the security was worth more than the sum of principal and interest due. *Sexton v. Dreyfus, supra*" (page 164).

This is not overruling Sampsell; this is confirming the decision in that case except insofar as Vanston condemns compound interest.

But, if the 9th Circuit is out of step, they need but look to the decisions of this Court to join the other courts of appeal.

Sexton v. Dreyfus, 219 U. S. 339, foreshadowed the road. In that case the securities were worth *less* than the debt. The creditors sold the securities and then filed a claim for the difference between debt, plus interest after bankruptcy, and the sale price. This post bankruptcy interest—where the securities were worth *less* than the debt—was properly disallowed.

Mr. Justice Holmes said in that case, relative to cases where the security was worth *more* than the debt, that:

> "the view that we adopt is well presented in the late Judge Lowell's work on Bankruptcy; seems to have been entertained in *Coder v. Arts,* 152 Fed. 943."

Coder v. Arts squarely states the rule adopted by the Court below and the other Courts of Appeal. *Coder v. Arts* is the case which petitioner in its brief (page 11) says is of doubtful applicability or questionable validity in view of the recent decisions of this court. But this same case of *Coder v. Arts* is cited in Vanston, (page 165) as authority for the rule adopted below. Nevertheless petitioner says that the rationale of *Coder v. Arts* is rejected in Vanston.

This Court has also recognized the rule of *Coder v. Arts* in *Ticonic Bank v. Sprague,* 303 U. S. 406, at page 413:

> "This court has already held that a lien holder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy

> (*Coder v. Arts,* 213 U. S. 223, 245 affirming 152 Fed. 943, 950) or into equity receivership (*American Iron and Steel Mfg. Co. v. Seabord Air Line Ry.,* 233 U. S. 261) * * *"

A note at the bottom of page 413 states:

> "Compare 7 Vin. Abr. 110; "A mortgage shall have his interest run on upon a bankrupt's estate, because he hath a right in rem but as to other interest, it ceaseth on the bankruptcy. Per Ld. Chan. King 18 July 1729."

The rule is evidently not a new rule.

In *Vanston Bondholders Committee v. Green, supra,* this court said:

> "Simple interest on secured claims accruing after the petition (in bankruptcy) was filed was denied UNLESS THE SECURITY WAS WORTH MORE THAN THE SUM OF PRINCIPAL AND INTEREST DUE." (Emphasis supplied.) (Page 164.)

There is no conflict between the various courts of appeal; this Court has previously decided the question involved in this case.

The remaining bases for the petition for writ of certiorari assume that the exception to rule allowing post bankruptcy interest is discretionary. If it is, the court below stated (R. 55):

> "* * * it cannot be said that they (Weeks) acted arbitrarily or unreasonably in insisting, through appropriate court procedure in a bona fide attempt to protect their contract rights, that their contract be honored according to its terms."

All Weeks did was to insist upon his legal rights; his legal rights were sustained by the court of appeals. In-

sistence upon ones legal rights, and securing them by appropriate court action certainly would not be a valid basis for branding their conduct "inequitable" or denying them these rights declared and awarded to them by law.

If discretion were to be exercised, the court of appeals obviously would exercise it by allowing Weeks the interest.

Petitioner also states that a question of administration of bankrupt estates is involved. A mathematical computation only is involved, whether post bankruptcy interest is allowed or not; the administration of bankrupt estates is not affected one way or the other. The mathematical computation remains in either event, only the date to which interest is to be computed is changed.

If the decision in this case raised any problem in the administration of the bankruptcy act, the other circuits have successfully solved the problem, if any, raised by identical decisions.

Petitioners claim that the allowance of interest will penalize the unsecured creditors is answered by this Court in *Ticonic Bank v. Sprague, supra,* at page 414.

Stripped to the bare essentials: Weeks owned property; they agreed to sell it to a corporation which became bankrupt. They agreed to convey upon payment of $25,000.00 *and* interest. The purchaser wishes the benefit of the contract but does not want to pay the purchase price. They wish the advantage of the contract—which brought approximately $20,000.00 to the bankrupt estate (the difference between (a) the price for which the trustee sold the property and (b) the balance due on the contract with Weeks), but wish to repudiate that part of the contract requiring payment of the purchase price.

"Among the rules which have become axiomatic is one that a party must be consistent and not contradictory in the positions which he takes. In the language of Lord Kenyon he must, 'not blow hot and cold' at the same time. And one of the most important applications of the rule is where a party endeavors to establish a right or title in himself under one provision or implication of a deed or other instrument by ignoring or contradicting another provision or implication which is destructive or fatally repugnant. Now according to the reason of the rule, which applies as well to deeds as to wills, a person cannot claim under the instrument without confirming it. He must found his claim on the whole and cannot adopt that feature or operation which makes in his favor and at the same time repudiate or contradict another feature or operation which is counter or adverse to it."

Porter v. Landis, 329 Mich. 76, page 81.

CONCLUSION

We ask that the petition for a writ of certiorari be denied.

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